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IN THE

Supreme Court of the United States

VICTOR A. RITA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The presumption of reasonableness is a legal fiction. It is based not on the objective language of the Sentencing Reform Act ("SRA"), but on a subjective preference for a determinate sentencing regime and mandatory Sentencing Guidelines. Crafted from whole cloth, the presumption is supported only by vague references to an ambiguous legislative history and repeated allusions to the "expertise" of the United States Sentencing Commission ("USSC"). These considerations cannot justify reaching beyond the text of the statute, particularly when application of the presumption raises serious constitutional concerns in all cases and so plainly results in an unreasonable sentence in this one.

I. THE PRESUMPTION OF REASONABLENESS IS INDEFENSIBLE UNDER 18 U.S.C. § 3553 AND *BOOKER*.

1. There is no statutory basis to accord a presumption of reasonableness to within-Guidelines sentences. See Pet. Br. 9-15, 26-28. The government acknowledges that the SRA requires the district court to consider *all* of the sentencing factors delineated in § 3553(a) and to impose a sentence "'sufficient but not greater than necessary'" to satisfy the purposes of sentencing set forth in § 3553(a)(2). Gov. Br. 4, 42. But it ignores almost completely the central issue in this case: there is *nothing* in the text of § 3553(a) that authorizes giving presumptive weight to the Guidelines range. The government devotes a mere two pages to analyzing the text of the statute, see *id.* at 21-22, which is plain and therefore dispositive, see *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992).

Within § 3553(a), the Guidelines are simply the *fourth* of *seven* enumerated factors. See § 3553(a); Pet. Br. 10. If Congress had wanted to give them presumptive weight, it

could have done so, whether before *Booker* or after.[1] But it has not.

In response, the government asserts that "the fact that Section 3553(a) refers to the Guidelines ... only underscores the reasonableness of using the Guidelines as a reference point." Gov. Br. 22. To the contrary, this only underscores the necessity of treating the recommended range as merely one of the multiple factors. The statutory language clearly contemplates that the Guidelines should be viewed as a single factor, of no greater weight than others. *United States* v. *Booker*, 543 U.S. 220, 304-05 (2005) (Scalia, J., dissenting in part) ("The statute provides no order of priority among all th[e] factors ...."). The *only* textual "reference point" in the statute is the command to consider the relevant factors and impose a sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing. § 3553(a); see Pet. Br. 12-15.

Similarly unavailing is the government's insistence that the Guidelines "reflect the considered judgment of an expert agency, Congress, and sentencing judges across the country." Gov. Br. 22-24. This argument is, at its heart, a misplaced call for deference to the USSC. Deference is due to an agency's interpretation of a statute only when the text of the statute is ambiguous. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Here, the statute is unambiguous. Any call for deference is thus unwarranted.

It is no answer that, notwithstanding the plain text, the Guidelines deserve presumptive weight because they "integrate the congressional sentencing objectives in Section 3553(a)." Gov. Br. 16, 22. Section 3553(a) entrusts the duty of weighing the statutory purposes not to the USSC, but

[1] *See* Brief of *Amici Curiae* United States Senators at 17-18, *Claiborne* v. *United States*, No. 06-5618 ("Senators Br."). Congress knows full well how to enact a statutory presumption when it wishes to do so. *See, e.g.*, 29 U.S.C. § 482(a); 35 U.S.C. § 282; 44 U.S.C. § 1507.

to the sentencing judge. Whether or not the USSC successfully "integrate[d] congressional sentencing objectives" in developing the Guidelines is immaterial to the district court's obligations as set forth in § 3553(a)(2). The statute mandates that the judge exercise his or her own judgment in balancing the relevant factors and purposes based on the facts of the individual case. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996). "[T]he Commission's view of what is 'better' is no longer authoritative, and district judges are free to disagree – as are appellate judges." *Booker*, 543 U.S. at 305-06 & n.4 (Scalia, J., dissenting in part).

And, even if it were true that the USSC merited deference, it is simply not the case that the Guidelines successfully "reflect the relevant Section 3553(a) factors." Gov. Br. 22. The briefs filed in this case have amply demonstrated the numerous reasons why this is not so. See, *e.g.*, Pet. Br. 12-15; Br. of Marc Miller et al., 12-22; NACDL Br. 12-20. To similar effect, myriad accounts document the flaws in the empirical analyses undertaken by the USSC. See generally Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentences After* United States v. Booker*: Why and How the Guidelines Do Not Comply with § 3553(a)*, 30 Champion 32 (2006); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 Geo. Mason L. Rev. 1001 (2001). Far from exercising "considered judgment" in characterizing and categorizing offender characteristics, the USSC's methodology was underdeveloped and intentionally "provisional." See Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 182 (1999).[2] And, even if the USSC's empirical methodology was perfect, the past sentences that the Commission examined in develop-

[2] "Even for those categories of cases in which the Commission did indeed seek to replicate past sentencing averages, the Commission's data was limited, and possibly compromised, in several fundamental respects." Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 60-61 (1998).

ing the Guidelines were not guided by the directives of the SRA and did not purport to comply with § 3553(a). The Guidelines thus do not and could not reflect an appropriate balancing of the statutory purposes of sentencing.[3]

2. The legislative history of the SRA in no way demonstrates that Congress understood "that substantial weight [would] be given to the Guidelines" even before it added the now-invalidated provision of § 3553(b) mandating adherence thereto. Gov. Br. 28. In fact, and putting to one side this Court's repeated admonition against "resort[ing] to legislative [intent] to cloud a statutory text that is clear," *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994), the history of the SRA strongly suggests that Congress did not intend subsection (a) to embody a presumption of reasonableness. The SRA's sponsor, Senator Kennedy, acknowledged that the original bill – without subsection (b) – would make the Guidelines range only one of several considerations relevant to sentencing. Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 41 (1998). To be sure, he and others contemplated that the Guidelines would have an impact on sentencing decisions, by informing judges of typical punishments, but this is a far cry from according

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[3] Contrary to the government's claim, Gov. Br. 19, statements of the original USSC, former Commissioners, and current Commission staff demonstrate widespread recognition that the USSC did not address the purposes of sentencing. *See* USSG, ch.1, pt. A(3) (USSC could not "reconcile the differing perceptions of the purposes of criminal punishment"); Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18046, 18121 (May 13, 1987) ("Of all of the goals of the Sentencing Reform Act, it is most unfortunate that the goal of rationality has been abandoned and even frustrated by these guidelines."); Breyer, *supra*, at 182 (USSC could not agree on sentencing purposes or what their effect should be); Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences*, 38 Ariz. St. L.J. 425, 465 (2006) (noting "Commission's failure to articulate a philosophy for federal sentencing").

them presumptive weight.[4] To the contrary, if legislators believed the Guidelines to be presumptive on the basis of subsection (a) alone, it would have been largely unnecessary for them to insert subsection (b) into the bill, which they viewed as setting forth "the basic presumptive aspects of the [G]uidelines." 124 Cong. Rec. 209, 383 (1978) (statement of Sen. Kennedy); see also Senators Br. 9-11 (discussing evolution of bill from advisory to presumptive).

Nor does the legislative history demonstrate, as the government claims, the insignificance of the parsimony provision of § 3553(a). Gov. Br. 27-28. Language instructing district courts to tailor their sentences based on the four traditional purposes of punishment had been present in the original bill introduced by Senator Kennedy, see Stith & Cabranes, *supra*, at 41 (citing S. 1437, 95th Cong. (1977)), and the parsimony principle formed the centerpiece of an alternative bill reported by members of the House of Representatives, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 271-72 (1993) (citing H.R. 6012, 98th Cong. (1984)). The phrase "sufficient but not greater than necessary" was added to the Senate bill not as an afterthought, as the government suggests, but as a deliberate means to incorporate the principle of parsimony contained in

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[4] In this regard, the government misreads several statements in the legislative history. *See* Gov. Br. 29. For example, the remark that the judiciary committee "'expect[s]'" that "'most sentences will fall within the range recommended in the sentencing guidelines,'" *id.* (quoting S. Rep. No. 95-605, at 1056 (1977)), was nothing more than an empirical prediction about where sentences would fall, not a prescription for where they *should* fall. The committee's statement that "'[t]he need for consistency in sentences ... [should] dissuade a judge from deviating from a clearly applicable guidelines range simply because it would have promulgated a different range,'" *id.* (quoting S. Rep. No. 95-605, at 892-93), did not even relate to § 3553(a). Rather, it reflected the committee's understanding that the statement-of-reasons requirement for a non-Guidelines sentence (now codified in subsection (c)(2)) would not be satisfied by a general expression of overall disagreement with the Guidelines.

the House legislation and to ensure fairness in sentencing. *Id.* Nothing in the history of the SRA suggests that legislators viewed the parsimony provision as less "fundamental" than other aspects of the bill, or expected that it would be trumped by an extra-statutory presumption of reasonableness.

3. The lion's share of the government's argument amounts to little more than a policy-based plea that affording the Guidelines presumptive weight would be salutary.[5] Specifically, the government insists that a presumption is warranted for within-Guidelines sentences to further the policy goal of increased uniformity in sentencing. Gov. Br. 24. However, the objective of the SRA was not to achieve blind uniformity through compliance with the Guidelines. It was, rather, to achieve the linked goals of "avoiding *unwarranted* sentencing disparities ... while maintaining sufficient flexibility to permit individualized sentences." 28 U.S.C. § 991(b)(1)(B) (emphasis added). Even before *Booker* mandated that sentencing judges exercise discretion to sentence throughout the statutory range to comply with the Sixth Amendment, Congress recognized that the individualized exercise of discretion was essential to achieving the objectives of the SRA.[6] Senators Br. 10-

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[5] Taking sides on such policy debates is, of course, the province of the legislature, not the judiciary. *Alabama* v. *Bozeman*, 533 U.S. 146, 156 (2001). Notably, the *amici curiae* brief filed by the Senators in *Claiborne* v. *United States*, No. 06-5618, did not request this Court to endorse a presumption of reasonableness. Senators Br. 19-20.

[6] Directly contrary to this statutory mandate, the USSC has repeatedly revised the Guidelines in order to discourage the exercise of discretion by district judges, by prohibiting and restricting consideration of individual characteristics, *see* USSG, ch.5, and by overruling sentencing decisions based on individual factors not included in the Guidelines. *See, e.g.*, Br. *Amici Curiae* National Veterans Legal Services Program et al., 10-12 (noting that the USSC promulgated USSG § 5H1.11, prohibiting consideration of military service, overruling *United States* v. *Pipich*, 688 F. Supp. 191 (D. Md. 1988), with "no explanation"); USSG, amend. 466 (effective Nov. 1, 1992) (promulgating § 5H1.12, and overruling *United States* v. *Floyd*, 945 F.2d 1096, 1100-01 (9th Cir. 1991), *overruled on other grounds*, *United States* v. *Atkinson*, 990 F.2d 501 (9th Cir. 1993) (en

11; see also S. Rep. No. 98-225, at 52-53 (1983) ("[T]he sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appropriate case. The purpose of the ... Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences."). Thus, to the extent that disparities in sentencing may sometimes result from full and reasoned application of § 3553(a), they are not "unwarranted" disparities at all. Rather, they reflect the proper functioning of the SRA, and therefore do not justify a presumption of reasonableness.

What is more, the claim that the Guidelines serve the SRA's policy of uniformity is fundamentally flawed. As the opening brief demonstrates, the Guidelines themselves contribute to unwarranted sentencing disparities. See Pet. Br. 35-38. For instance, the USSC acknowledges that the relevant conduct rules give rise to "significant sentencing disparities" and that "questions remain about how consistently they can be applied." USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 27, 50 (2004); see also Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent'g Rep. 16 (1997). Indeed, the government admits that disparities in sentencing "may result from differences in charging and plea bargaining practices," Gov. Br. 31, and the USSC recognizes "limits" to the extent that the Guidelines reduce such government-produced disparities, USSC Br. 30. Simply put, the SRA does not support uniformity above all else, and, to the extent it was meant to foster uniformity, the Guidelines are hardly the means to

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banc), which had permitted downward departures from the Guidelines due to lack of guidance as a youth). That the USSC overwhelmingly favors a mandatory system of determinate sentencing was and remains clear. *See, e.g.*, USSC Br. 5-6.

achieve that goal. According sentencing judges full discretion to impose non-Guidelines sentences is necessary to achieve the true uniformity objectives of the SRA.[7]

4. A presumption of reasonableness is also inconsistent with *Booker*'s requirement that reasonableness review apply "across the board." 543 U.S. at 263. That the remedial majority believed appellate review "would tend to iron out sentencing differences," *id.*, does not, despite the government's urgings to the contrary, Gov. Br. 14, endorse a presumption of reasonableness.[8] "If the majority thought otherwise – if it thought the Guidelines not only had to be 'considered' (as the amputated statute requires) but had generally to be followed – its opinion would surely say so." *Booker*, 543 U.S. at 305-06 (Scalia, J., dissenting in part); see also Pet. Br. 26.

The government purports to recognize that *Booker* establishes the same standard of reasonableness review for *all* sentences. Yet, it later argues that Mr. Rita has failed to "rebut" the presumption. Gov. Br. 14-15, 49. In so doing, the government implicitly acknowledges that a different standard applies to his sentence than to those outside of the Guidelines range. It cannot be claimed that reasonableness review applies equally "across the board," as *Booker* requires, 543 U.S.

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[7] *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83-84 (2003) ("Treating two offenders the same because the rules say so, even though they differ markedly in their culpability, in the harm caused by their crime, or in their risk of recidivism, is to elevate the rules above reason. ... Far from creating disparity, departure in these circumstances avoids true disparity." (footnote omitted)).

[8] The government also cites, at length, a passage from *Booker* noting the continued existence of the USSC, its obligation to collect information from the district courts, and its responsibility to revise the Guidelines accordingly. Gov. Br. 13-14 (citing 543 U.S. at 264-65). However, the government fails to address – much less rebut – petitioner's argument that "sentencing data will be relevant and useful for revision of the Guidelines only if the touchstone of reasonableness review ... is something other than the Guidelines themselves." Pet. Br. 43.

at 263, when the presumption demands different treatment for sentences within and without the recommended range.

The government also attempts to downplay the impact of the presumption, by arguing that it "merely recognizes that when the Sentencing Commission and the individual district court reach essentially the same conclusion, the resulting within-Guidelines sentence ordinarily satisfies that standard." Gov. Br. 14-15. This argument misapprehends the effect of the presumption of reasonableness by ignoring the effect of appellate review on district court decisionmaking. When a court of appeals adopts the presumption, it effectively announces that a sentence falling within the Guidelines range will satisfy the factors and purposes of § 3553(a). *E.g.*, *United States* v. *Green*, 436 F.3d 449, 457 (4th Cir.), *cert. denied*, 126 S. Ct. 2309 (2006); see also NYCDL Br. 5 (demonstrating that within-Guidelines sentence are almost never reversed). When a district court issues a within-Guidelines sentence in the shadow of this rule, it does not mean that the court has exercised independent judgment in weighing the statutory factors or has concluded that the Guidelines represent the proper balance of those considerations. Rather, it merely reflects the district court's good faith attempt to comply, often despite deep misgivings, FPCD Br. 9-11, with the appellate court's mandate.[9] The supposed "alignment" between the final sentence and the Guidelines range is not a justification for the presumption of reasonableness but rather a direct – and improper – result of it.

That this has occurred and will occur is not open to serious dispute. Simply put, the presumption of reasonableness has bite. Indeed, it would be passing strange for the government to devote such energy to defending the presumption if it were as ineffectual and unnecessary as the government now claims.

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[9] Nor does it reflect, as the government implies, that district courts are "'ignor[ing] their oath.'" Gov. Br. 36. District courts in these circuits are simply attempting to honor their oath to follow the law of their own circuits. Pet. Br. 30 & n.17.

Gov. Br. 16, 38-39. Although the government contends that sentencing practices have remained stable in all circuits since *Booker* was decided, *id.* at 39, the very data upon which they rely show a trend in each presumption circuit of fewer below-Guidelines sentences imposed after adoption of the presumption than before. See USSC Br. 5a-9a, 11a, 13a. Moreover, there is a significant gap in the rate of below-Guidelines sentences in presumption and non-presumption circuits, which widens over time from 14.3% in February 2006 to 34.2% in November 2006. See FPCD Br. A1-4. As the USSC itself recognizes, such a "significant and widening gap between the rate of below-Guidelines sentences" in presumption and non-presumption circuits supports the contention that a presumption of reasonableness renders the Guidelines effectively mandatory. USSC Br. 16.[10]

II. THE PRESUMPTION OF REASONABLENESS IS CONSTITUTIONALLY SUSPECT.

The statutory language, legislative history, and this Court's decision in *Booker* all support petitioner's reading of § 3553(a). But, even if the statute were ambiguous (which it is not), this Court should avoid the government's interpretation because reading the SRA to accord a presumption of reasonableness for within-Guidelines sentences would raise grave constitutional concerns. See *Jones* v. *United States*, 526 U.S. 227, 239-40 (1999).

This Court recently reaffirmed, in *Cunningham* v. *California*, No. 05-6551, 2007 WL 135687 (U.S. Jan. 22, 2007), the "bright-line" rule that it has consistently applied since *Apprendi*: "'[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at *7 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)). The

[10] Notably, the data upon which the government relies in its brief is, at least in part, not available to the public. The Commission is required to "publish" the data it collects on sentencing. *See* 28 U.S.C. § 995(a)(14).

right to a jury trial, embodied in the Sixth Amendment, guarantees that a defendant will suffer no greater punishment upon conviction than that which is authorized under governing law based solely on the facts found by a jury. *Id.* at *4. In other words, the maximum sentence that a judge may constitutionally impose is that permitted exclusively by the jury's verdict or the defendant's admissions. *Id.* A judge cannot rely on his or her own findings to justify a higher sentence. *Id.*

In all of the cases following *Apprendi*, from *Blakely* through *Booker* to *Cunningham*, the Court disapproved of sentencing systems that permitted a judge to make these types of findings. In *Blakely*, state law required a judge to sentence within a given range, as determined by the facts reflected in the verdict or plea, unless the judge found "'substantial and compelling reasons'" justifying an increased sentence. *Blakely* v. *Washington*, 542 U.S. 296, 299-300 (2004). In *Booker*, the mandatory Guidelines prohibited the judge from imposing a sentence above the "base range," determined by the facts found by the jury or admitted by the defendant, absent factual findings warranting an enhancement or departure. 543 U.S. at 227, 233-34. In *Cunningham*, state law directed the judge to impose a presumptive "middle term" sentence, established by reference to the verdict or plea, unless the judge found "circumstances in aggravation" warranting a sentence of the "upper term." 2007 WL 135687, at *7, *11; see also *id.* at *21 (Alito, J., dissenting). All of these systems were found to be constitutionally suspect because they established a maximum lawful sentence based on the facts submitted to the jury or admitted by the defendant, and then allowed the judge to impose a sentence above that range based on his or her own supplemental findings of fact. See *id.* at *8-14.

The presumption of reasonableness operates similarly. It holds that a sentence within the Guidelines range will be presumed reasonable (and hence lawful) without the need for further explanation or additional findings. *E.g.*, *Green*, 436

F.3d at 457. Sentences above the Guidelines range, however, must be supported by particular circumstances identified by the district judge. *E.g.*, *United States* v. *Cage*, 451 F.3d 585, 594-95 (10th Cir. 2006) ("[W]here ... a district court effectively ignores the advice of the Guidelines[,] ... we should only treat the actual sentence as being a reasonable application of § 3553(a) factors if the facts of the case are dramatic enough to justify such a divergence from the politically-derived guideline range."). In other words, a sentence above the Guidelines range may be imposed only if the judge expressly finds additional circumstances – not found by the jury – warranting the variance.

Courts applying the presumption of reasonableness effectively mandate, through their interpretation of § 3553(a), that district courts impose a sentence within the range recommended by the Guidelines absent additional facts justifying a variance. See *id.* Indeed, some courts now hold that the burden to find these additional facts, beyond those found by the jury, increases as the judge departs further from the Guidelines sentence. This "proportionality principle" logically follows if the Guidelines are the touchstone of reasonableness, and courts have recognized that the facts found by the judge must become more "extraordinary" as the variance from the Guidelines grows. *E.g.*, *United States* v. *Moreland*, 437 F.3d 424, 434 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006). The government concedes that "proportionality review asks for an *especially strong justification* for a sentence that varies widely from the advisory Guidelines range." Gov. Br. 34, *Claiborne* v. *United States*, No. 06-5618 (emphasis added).

The circumstances necessary to justify a variance must be understood, as they were in *Cunningham*, to involve additional findings of fact. See 2007 WL 135687, at *6-7, *14. Indeed, courts of appeals applying the presumption have held that a district court may not vary from the Guidelines based solely on policy disagreements with the Guidelines or Congress, and they have required district courts to offer reasons

for the variance beyond those reflected in the verdict or plea. See *United States* v. *Eura*, 440 F.3d 625, 633-34 (4th Cir. 2006); *United States* v. *Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006). Imposing a variant sentence necessarily involves additional, judicial findings of fact. These facts have the effect of increasing the maximum punishment to which the defendant would otherwise be exposed under governing law. And since they are to be found by the judge, not the jury, the Sixth Amendment is implicated.

The Court recognized in *Cunningham* that a sentencing system in which "judges are not free to exercise their 'discretion to select a specific sentence within a defined range'" raises constitutional concerns. 2007 WL 135687, at *14 (quoting *Booker*, 543 U.S. at 233). In the government's proposed world, where the presumption of reasonableness governs, the sentencing judge is not "free" to exercise discretion to sentence outside of the base Guidelines range, as determined by the facts reflected in the verdict or plea, without making additional findings justifying an enhancement under the Guidelines or a variance from that range.[11] This Court's decisions raise grave constitutional doubts about such a system. See *Booker*, 543 U.S. at 233.

"*Booker*'s remedy for the Federal Guidelines ... is not a recipe for rendering [this Court's] Sixth Amendment caselaw toothless." *Id.* Yet that is precisely what the presumption of reasonableness does. It turns the fundamental and substantive principle of the *Booker* constitutional majority into a game of clever wordplay. Congress, *Booker* taught, may not raise the cap on the lawful sentencing range based on findings made by

[11] That the district judge has discretion to decide upon the nature of the additional facts that may justify a variance should not be understood as discretion to grant a variance in the absence of any additional facts. *Blakely*, *Booker* and *Cunningham* recognize that only discretion in the latter sense comports with the Sixth Amendment. *See, e.g.*, *Cunningham*, 2007 WL 135687, at *12. District courts operating under the presumption of reasonableness enjoy discretion to determine the facts that justify a variance, but not to grant a variance absent additional findings of fact.

judges, instead of juries. But, the government argues, if the "mandate" is changed into a "presumption of reasonableness," it is constitutionally permissible, even though the effect is precisely the same: a sentencing judge still must find additional facts to alter the lawful sentencing range.[12] Whether this backdoor effort to undermine the constitutional majority in *Booker* is itself constitutional need not be decided in this case. The government's position is constitutionally suspect and should be rejected, all the more so because it is based on an interpretation that is directly contrary to the text of § 3553(a). *Supra* at 1-4.

III. THE SENTENCE IMPOSED IN THIS CASE IS UNREASONABLE, WHETHER OR NOT THE PRESUMPTION OF REASONABLENESS APPLIES.

The government asserts that, despite the lack of an adequate explanation for the sentence, the judgment of the district court should be deemed reasonable because (1) the district court was not required to provide a statement of reasons for the sentence, (2) the record as a whole reflects adequate consideration of the relevant sentencing factors, and (3) the mitigating evidence presented by Mr. Rita was insufficient to rebut the presumption of reasonableness accorded to the sentence. Gov. Br. 41, 45-46, 49-50. Each argument fails.

1. Section 3553(c) gives an unambiguous command: "The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence ...." § 3553(c). The government agrees that this provision applies to any sentence, regardless of where it falls in the statutory

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[12] The similarity to the invalidated mandatory Guidelines system becomes even clearer in light of the government's position that a sentencing judge need offer no reasoned explanation at all when sentencing within the Guidelines range. *See infra* at 15. According to the Government, even after *Booker*, a sentence by a judge who treats the Guidelines as if they were commands to be followed, rather than advice for the exercise of discretion, is all but immune from reversal.

range or whether it is presumed reasonable. Gov. Br. 39-40. The government nevertheless argues that, when a sentence falls within the Guidelines range, the district court need not provide a statement of reasons in support of judgment. "[I]n the absence of contrary indications in the record," the government asserts, "a court of appeals may presume that the district court understood its obligations and adequately considered the Section 3553(a) factors, since '[t]rial judges are presumed to know the law and to apply it in making their decisions.'" *Id.* at 41 (alteration in original) (quoting *Walton* v. *Arizona*, 497 U.S. 639, 653 (1990)).

This argument not only conflicts directly with the statutory text; it advocates a wholesale abnegation of appellate review. In the government's view, a judgment should be affirmed, notwithstanding the lack of any indication of a reasoned exercise of discretion, so long as the record does not include affirmative evidence of error. Contrary to the commands of § 3553, a district court would not need to describe its rationale for a sentence or its consideration of the statutory factors. Indeed, it would be provided with a strong, perverse reason not to explain itself: to do so is to create a risk of reversal that would not otherwise be present, since an extensive record will serve only as a basis for vacating the judgment. The less said by the district court, in the government's view, the better.

This fundamentally misapprehends the nature and necessity of appellate review. Appellate courts can certainly presume in many instances that a district court recognized the statutes and rules governing a particular issue and attempted to apply them in rendering judgment. *Walton*, 497 U.S. at 653-54, *overruled on other grounds*, *Ring* v. *Arizona*, 536 U.S. 584 (2002). But, even if courts of appeals can assume that the appropriate standard was applied, they cannot assume that the standard was applied *correctly*. It is inevitable that district courts, despite their best efforts, will sometimes commit legal or factual error. Only if the district court provides an explanation of its judgment can the courts of appeals exercise the

meaningful oversight necessary to address these issues. See *United States* v. *Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005) ("[W]e will not infer a reasoned exercise of discretion from a record that ... is silent.").

This Court has so held. In *United States* v. *Taylor*, 487 U.S. 326 (1988), the Court concluded that, "[when] Congress has declared that a decision will be governed by consideration of particular factors, a district court must ... *clearly articulate their effect* in order to permit meaningful appellate review." *Id.* at 336-37 (emphasis added). If the district court has not explained its judgment, demonstrating rational assessment of the statutory factors, its decision must be reversed. See *id.* at 326-27.

The government argues that the rule of *Taylor*, derived from a phrase of the Speedy Trial Act identical to one in the Sentencing Reform Act, compare 18 U.S.C. § 3162(a) ("shall consider"), with § 3553(a) ("shall consider"), cannot be applied in the sentencing context. It cites nothing in the language or legislative history of the Acts to support this conclusion. Rather, it merely asserts once again that the Guidelines already "'take[] into account'" all of the factors of § 3553(a). Gov. Br. 42. This is incorrect both as a matter of fact, see *supra* at 2-4, and as a matter of statutory interpretation, see *Northcross* v. *Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam) ("[S]imilarity of language ... is, of course, a strong indication that the two statutes should be interpreted *pari passu*."). Most importantly, it contravenes the express directive of § 3553(c), which explicitly demands – in accordance with the holding of *Taylor* – a statement of reasons for the judgment. § 3553(c).

The government's sole argument related to the text of the statute is that, because § 3553(c)(2) requires a district court to provide the "specific" reason for imposition of a non-Guidelines sentence, § 3553(c) must be read to require only a "general" reason for imposition of a Guidelines sentence. Gov. Br. 39-40. This misses the mark.

The statements contemplated by subsections (c) and (c)(2) serve qualitatively different purposes. Subsection (c) requires that the district court provide, in accordance with *Taylor*, the "reason for its imposition of the particular sentence" in light of the relevant factors and purposes of § 3553(a). § 3553(c). Subsection (c)(2), in contrast, requires that the district court provide the "specific reason for the imposition of a sentence *different from that described [in the Guidelines]*." *Id.* § 3553(c)(2) (emphasis added). So, whereas subsection (c) focuses on the district court's balancing of considerations under § 3553(a), subsection (c)(2) homes in on the deficiencies of the Guidelines in the particular case at issue. It does so because the latter information has a special purpose: it is meant to be (although often is not) used by the USSC to revise the Guidelines. See 28 U.S.C. § 994(o), (w); see also S. Rep. No. 98-225, at 79 ("This requirement would essentially explain why the court felt the guidelines did not adequately take into account all the pertinent circumstances of the case at hand."). There is no inherent overlap between the statements required under subsections (c) and (c)(2) and therefore no reason to limit the scope of the former provision.

The government ably burns a straw man when it asserts that the district court need not "address *every* argument for a sentence higher or lower than the one imposed." Gov. Br. 42 (emphasis added). No one has claimed otherwise. Section 3553(c) requires only that the judge offer an affirmative explanation, indicating to the degree possible why the final sentence was imposed in light of the relevant factors and purposes. See, *e.g.*, *United States* v. *Johnson*, 467 F.3d 559, 563, 566 (6th Cir. 2006); *United States* v. *Sanchez-Juarez*, 446 F.3d 1109, 1116-18 (10th Cir. 2006). There is no need, for instance, for the judge specifically to reject each incrementally lower or higher sentence or address obviously irrelevant issues. *Accord Taylor*, 487 U.S. at 336-37.

2. The government does not argue that the district court in this case offered a thorough statement of reasons when im-

posing sentence. See Gov. Br. 45-49. Rather, it contends that the record "as a whole," and particularly the district court's admission of evidence relating to Mr. Rita's severe health problems and exemplary military service, reflects consideration of the relevant factors and satisfies the statutory obligation to state the reasons for the sentence. *Id.* at 44, 45-49. This is plainly incorrect.

Compliance with § 3553(c) and *Taylor* requires that the district court do more than simply accept relevant evidence into the record. The SRA mandates not only that the district court "receive" information concerning the appropriate sentence, 18 U.S.C. § 3661, but that it "consider" that information and then "state ... the reasons" for imposing a particular sentence in light thereof, § 3553(a), (c). That a district court accepts evidence relating to the statutory factors and purposes into the record does not satisfy the statutory requirement, and provides no basis for a court of appeals to determine that the district court has applied that information in a reasonable manner in crafting the final sentence. Cf. *United States* v. *Jackson*, 408 F.3d 301, 305 (6th Cir. 2005) (vacating sentence when district court offered a list of the defendant's relevant characteristics but did not explain how they impacted the final sentence).

The government concedes that "[t]he court's statement of reasons surely could have been lengthier, or more detailed." Gov. Br. 48. To be sure. In fact, the statement *was required to be* more detailed. Mr. Rita introduced substantial information concerning his physical condition and military service. These considerations, as the government acknowledges, constituted mitigating circumstances relating directly to the factors and purposes of § 3553(a). *Id.* at 48-49. Even if these facts were undisputed, the district court was obliged under § 3553(c) and *Taylor* to explain how it applied the information to arrive at the final sentence. Its failure to do so renders the sentence unreasonable, whether or not a presumption of reasonableness applies.

3. The government finally argues that, assuming the district court's explanation was adequate and the presumption of reasonableness applies, the sentence may be affirmed as reasonable because the district court understood its statutory obligations and fully considered the relevant factors and purposes. *Id.* at 45-50. This is, again, incorrect. The record below affirmatively demonstrates that the district court misunderstood and misapplied the standards governing the imposition of sentence under § 3553(a).

Most notably, the district court assumed that it was somehow bound by the Guidelines range, despite its apparent recognition that the Guidelines had been rendered advisory by *Booker*. In imposing sentence, the district court stated that it was "unable to find that the sentencing guideline range ... is an inappropriate guideline range." J.A. 87. This statement strongly suggests that the district court viewed the Guidelines range as presumptively correct, and effectively binding in the absence of additional facts supporting a variance. This constitutes plain legal error, and renders the sentence unreasonable whether or not a presumption of reasonableness is applied on appeal.

The government counters that, because the sentence was at "the bottom of the advisory Guidelines range," Mr. Rita cannot establish that his sentence was unreasonable. Gov. Br. 44-45. Quite the opposite is true. The fact that Mr. Rita was sentenced at the bottom of the range, when considered with the district court's comments regarding the lack of evidence to support a variance, suggests that the district court viewed the Guidelines as establishing a presumptive limit on its discretion, which could not be overcome absent a substantial justification. In other words, the judge apparently believed that he could approach the edge of the Guidelines range, but that something more would be necessary to step over it. See *Cunningham*, 2007 WL 135687, at *10 (recognizing that such a system violates *Booker*).

Had the district court in this case exercised its discretion to sentence throughout the entire statutory range, it more than likely would have imposed a sentence below the 33-month term of imprisonment recommended by the Guidelines.[13] Mr. Rita devoted 25 years to serving his country in the military, completing tours of duty in the Vietnam and Gulf Wars and earning over 35 awards and medals. He now suffers from a litany of serious medical ailments, including exposure to Agent Orange, many of which can be treated more effectively outside of a prison environment. Pet. Br. 3-4, 18-23. The government concedes that these facts – which are not addressed in the Guidelines calculation – are undisputed and militate in favor of a lesser sentence. Gov. Br. 48-49. A term of imprisonment – much less one of almost three years – was wholly unnecessary to serve the purposes of deterrence, incapacitation, or rehabilitation, see § 3553(a)(2)(B)-(D), and it was similarly unwarranted to advance any interest in retribution, see § 3553(a)(2)(A), especially since the district court candidly acknowledged that it could not assess the impact of Mr. Rita's two misstatements to the grand jury or the "seriousness" of the third-party investigation that precipitated the charges against him. J.A. 86-87. These circumstances, together with the district court's perception of being cabined by the Guidelines range, rebuts any "presumption of reasonableness" and establishes the unreasonableness of the sentence.

CONCLUSION

The decision of the Fourth Circuit should be reversed, the sentence vacated, and the case remanded to the district court for resentencing.

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[13] Contrary to the government's suggestion, Mr. Rita does not argue that the Guidelines range was improperly calculated. *See* Gov. Br. 47 (discussing Pet. Br. 3, 21-22 & n.11). The "accessory after the fact" enhancement simply illustrates the lack of procedural protections accorded to defendants who are subject to uncharged-conduct enhancements under the Guidelines, and illuminates the multiple grounds on which the district court in this case could have based a lesser sentence.

Respectfully submitted,

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